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IN THE

Supreme Court of the United States

UNISYS CORPORATION,
Petitioner,

v.

PENNSYLVANIA BOARD OF FINANCE AND REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of Petitioner, Unisys Corporation.[1] Tax Executives Institute, Inc., (hereinafter "TEI" or "the Insti-

[1] Pursuant to Rule 37.6, *amicus* TEI states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Tax Executives Institute, Inc., has received the written consents of Petitioner and Respondent to the filing of this brief; those consents have been filed with the Clerk of the Court.

tute") is a voluntary, non-profit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and has approximately 5,300 members who represent more than 2,800 of the leading corporations in the United States, Canada, and Europe. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws, reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and to vindicating the Commerce Clause and other constitutional rights of all business taxpayers. The members of the Institute represent a cross-section of the business community in North America and are, almost without exception, engaged in interstate commerce.

The multijurisdictional companies represented by the Institute's membership are significantly affected by the allocation and apportionment of income and net worth among the various states. As a result, TEI's members will be directly affected by the Supreme Court's decision whether to grant a writ of certiorari in this case. The specific issue involved in this case is whether the franchise tax scheme employed by Pennsylvania, which includes both the net worth and dividends received from subsidiaries of a taxpayer in the tax base, but uses only the taxpayer's property, payroll, and sales in the apportionment formula, results in fair, rational, and constitutional apportionment. The case raises fundamental issues about the legitimacy of a state's apportionment mechanism under the Commerce and Due Process Clauses. A writ of certiorari should be issued here to enable the Court to confirm that the Constitution does not permit apportionment of a consolidated or unitary multistate tax base without taking into account the corresponding apportionment factors of the businesses in the consolidated or unitary group generating the income or value constituting the tax base.

This case has significant ramifications for taxpayers other than Unisys. Its resolution will directly affect the tax liabilities of other businesses subject to Pennsylvania's tax system, and indirectly affect the tax systems of other states that apply similar principles. Indeed, approximately 1,000 cases on appeal in Pennsylvania are awaiting the outcome of this case. As individuals who must contend daily with the interpretation and administration of the nation's tax laws, the Institute's members—and the companies by whom they are employed—have a vital interest in the proper disposition of this case.

SUMMARY OF ARGUMENT

1. The issue in this case is whether Pennsylvania can include worldwide income and net worth in the tax base while employing an apportionment formula that includes the apportionment factors of only the parent corporation, *i.e.*, whether "factor representation" is required by the Constitution. This case presents the Court with an opportunity to address an issue that was left open in *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425 (1980).

2. In computing Pennsylvania's franchise tax for the tax years at issue, Unisys Corporation calculated its tax base with regard to its own net worth and average income, and elected to use a three-factor apportionment formula, taking into account its own payroll, tangible property, and sales for those years. On review, the Pennsylvania Department of Revenue adjusted Unisys Corporation's franchise tax upward substantially by including the aggregate net worth of its hundred-plus subsidiaries worldwide and capitalized dividends received from these subsidiaries into the tax base, but *not* making corresponding adjustments to reflect the property, payroll, and sales of the subsidiaries in the apportionment factors.

3. Under the Commerce Clause and Due Process Clause of the Constitution, a state may not tax value earned outside its borders. *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982); *see* U.S. Const. art. I, § 8, cl. 3 (Commerce Clause); U.S. Const. amend. XIV, § 1 (Due Process Clause).

Dividing income among the several states resembles "slicing a shadow." *Container Corp. v. Franchise Tax Bd.* 463 U.S. 159, 192 (1983). Absolute consistency, even among taxing authorities using the same apportionment formula, "may just be too much to ask," *id.*, but there are constitutional limits on a state's use of an apportionment formula, especially in respect of income derived beyond a state's borders. No state has *carte blanche* in devising or applying its apportionment scheme. The shadow must be sliced, and it must be sliced fairly in accordance with constitutional principles.

4. One means of taxing in-state income is the use of the unitary business principle which calculates the local tax base by first defining the scope of the unitary business of which the taxed enterprise's activities in the taxing state form one part, and then apportioning the total income of the unitary business between the taxing state and other jurisdictions based on a formula taking into account objective measures of the corporation's activities within and without the jurisdiction. *Container Corp.*, 463 U.S. at 165.

To pass constitutional muster, the apportionment formula must, first and foremost, be fair. *Container Corp.*, 463 U.S. at 169. Here, the issue is whether the apportionment formula used by Pennsylvania is properly designed to ensure against the proscribed taxation of extraterritorial income and value. In this case, Pennsylvania included all of Unisys Corporation's dividends from its subsidiaries, as well as their capitalized net worth, in its apportionable tax base. The state, however, did not include in the denominator of the three-factor apportionment formula the property, payroll, and sales of the subsidiaries that produced that income and value.

Thus, Pennsylvania's taxing scheme did not provide for "factor representation" in respect of the net worth of, and dividends received from, Unisys Corporation's subsidiaries.

5. An apportionment formula that fails by design to take into account the factors generating the apportioned income is constitutionally flawed because there can never be a "rational relationship between the income attributed to the State and the intrastate values of the enterprise." *Mobil,* 445 U.S. at 436. The failure to provide factor representation is "inherently arbitrary," *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 121 (1920), and cannot help but produce a result that reflects neither "a reasonable sense of how [the] income [was] generated" (as required by *Container Corp.*, 463 U.S. at 169) nor "the relative contribution of the activities in the various States to the production of total unitary income" (*Butler Bros. v. McColgan*, 315 U.S. 501, 509 (1942)). This Court's prior holdings teach this conclusion and common sense confirms it.

In *Mobil*, the Court acknowledged that the factor representation issue could be one of constitutional import, but declined to resolve it on the ground that the issue had not been properly raised. 445 U.S. at 434. The Court reserved the question, stating, "we need not, and do not, decide whether combined apportionment of this type [inclusion of the Mobil subsidiaries' and affiliates' sales, payroll, and property in the apportionment formula] is constitutionally required." *Id.* at 441 n.15. This case presents an opportunity to address the issue.

6. Because apportionment methodologies employed in state taxing schemes are only "'rough approximation[s]' of . . . corporate income that [are] 'reasonably related to the activities conducted within the taxing state,'" *Exxon Corp. v. Dep't of Revenue*, 447 U.S. 207, 223 (1980), *quoting Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273-74 (1978), distortion can occur and must be protected against. Indeed, the "gross

distortion" test arose from the Court's recognition that the taxing methodology employed by a state could operate "unreasonably and arbitrarily, in attributing to [a State] a percentage of income out of all appropriate proportion to the business transacted in that state" *Hans Rees' Sons, Inc. v. North Carolina* ex rel. *Maxwell,* 283 U.S. 123, 135 (1931).

7. *Amicus* TEI submits that the constitutionality of the state taxing scheme does not depend solely on whether a certain mathematical threshold is reached or exceeded. In this case the state did not even undertake to effect a fair result. Rather, the Commonwealth Court of Pennsylvania blithely concluded that the distortion—whatever its magnitude—was insufficient for constitutional relief. Similarly, the Supreme Court of Pennsylvania did not justify the apportionment formula on constitutional grounds but simply demurred the distortion was not sufficient to warrant intervention.

8. Where a state has made *no* effort to account for all the factors producing income or value in its apportionment scheme, whether the distortion is "gross" should not be a threshold question. To hold otherwise is to encourage the states to play a numbers game and insist that—even if inherent, structural distortion can be demonstrated—it is not enough. For Pennsylvania to wave its hand at obvious distortion and eschew an opportunity to remedy it suggests that it is driven less by adherence to constitutional principles than by a desire to maximize revenues. TEI urges this Court to hold that any scheme with fundamental divergence between the source of the elements in the tax base and the source of the factors in the apportionment formula is unconstitutional.

9. A more demanding approach to distortive state tax schemes is justified because Pennsylvania is not alone in refusing to square its tax scheme with the mandates of the Due Process and Commerce Clauses. Taxing authorities in

several other states have reached the same odious conclusion as the Supreme Court of Pennsylvania: Asymmetry between the tax base and the factors used to apportion it is deemed acceptable. Fortunately, some states have come to a more principled conclusion, confirming that the failure to provide factor representation in applying the apportionment rules to unitary businesses contravenes the Due Process and Commerce Clauses.

10. The factor representation issue has been a neglected, rough area in state taxation for more than two decades, with even the courts below commenting on the lack of clear guidance. Without a doubt, Pennsylvania's apportionment formula violates *Container Corp.*'s requirement of fairness: It is externally inconsistent in that it does not represent a reasonable sense of how the income was generated. *See Container Corp.*, 463 U.S. at 169-70. The Court should grant a writ of certiorari in this case to affirm that where a state seeks to apportion a multistate tax base that includes value attributable to multiple corporations in a unitary or consolidated group, the state's apportionment formula must include appropriate amounts of payroll, property, and sales from all such corporations. Only by requiring factor representation can the Court vivify the constitutional requirement of a fair apportionment formula.

ARGUMENT

This case involves the limitations on the state's power to apportion income or value,[2] where the tax base used by the state accounts for income and net worth on a worldwide-consolidated basis. Specifically, the question is whether

[2] Although most case law on fair apportionment involves income taxes, a net-worth tax based on consolidated equity raises the same constitutional concerns as an income tax on consolidated entities.

Pennsylvania can include worldwide income and net worth in the tax base while employing an apportionment formula that includes the apportionment factors of only the parent corporation. Stated simply, the question is whether "factor representation" is required by the Constitution. The answer is yes. This case presents the Court with an opportunity to address an issue that was left open in *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425 (1980).

In computing Pennsylvania's franchise tax for tax years ending March 31, 1985, March 31, 1986, and December 31, 1986, Unisys Corporation calculated its tax base with regard to its own net worth and average income, and elected to use a three-factor apportionment formula,[3] taking into account its own payroll, tangible property, and sales for those years.[4]

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[3] A typical "three-factor" formula—similar to the one used by Pennsylvania in this case—compares (i) the taxpayer's property, payroll, and sales (receipts) within the taxing State to (ii) the taxpayer's total property, payroll, and sales. UNIFORM DIVISION OF INCOME FOR TAX PURPOSES ACT §§ 9-15, 7 U.L.A. 331 (1985, SUPP. 1997). Some jurisdictions use single-factor, double-factor, or weighted-factor formulae to apportion income among the states. JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION I: CORPORATE INCOME AND FRANCHISE TAXES ¶ 9.02 (3d ed. 1998).

[4] Pennsylvania imposes a franchise tax on the capital stock value of every foreign corporation doing business in the state. The tax is based on (i) the consolidated net worth of the taxpayer and its worldwide subsidiaries, and (ii) the taxpayer's capitalized average net income (including dividends from subsidiaries). The statutory formula adds 75 percent of consolidated net worth and capitalized average net income and divides by two. The apportionment formula used to determine Pennsylvania's taxable share of the tax base consists solely of the taxpayer's apportionment factors; no subsidiary apportionment factors are included. 72 P.S. § 7601(a). The multipliers used in the formula, and an alternative apportionment formula based on the taxpayer's assets, are not germane to the argument.

App. 3a, 57a.[5] On review, the Pennsylvania Department of Revenue adjusted Unisys Corporation's franchise tax upward substantially by including the aggregate net worth of its 100-plus subsidiaries worldwide and capitalized dividends received from these subsidiaries into the tax base, but *not* making corresponding adjustments to reflect the property, payroll, and sales of the subsidiaries in the apportionment factors. App. 3-4a, 57-58a. Thus, the Department of Revenue baked a consolidated pie but helped itself to a disproportionately large slice on a separate-entity basis. The constitutional significance of this mismatch between a worldwide-consolidated tax base and a separate-entity apportionment in determining Unisys's Pennsylvania tax is the subject of this case.

Under the Commerce Clause and Due Process Clause of the Constitution, a state may not tax value earned outside its borders. *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982); *see* U.S. Const. art. I, § 8, cl. 3 (Commerce Clause); U.S. Const. amend. XIV, § 1 (Due Process Clause). Such taxation is proscribed because the "fundamental purpose of the [Commerce] Clause is to assure that there be free trade among the several States," *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 335 (1977), and because extra-territorial taxation offends fundamental notions of due process and constitutes an "unreasonable clog upon the mobility of commerce." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935).

This Court has rightly observed that dividing income among the several states resembles "slicing a shadow." *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 192 (1983). Absolute consistency, even among taxing authorities

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[5] "App." references are to the various appendices bound with the Petition for a Writ of Certiorari, *Unisys Corporation v. Pennsylvania Board of Finance and Revenue*, No. 02-1543 (filed Apr. 23, 2003).

using the same apportionment formula, "may just be too much to ask," *id.*, but there are indisputable constitutional limits on a state's use of an apportionment formula, especially in respect of income derived beyond a state's borders.[6] The general permissibility of formulary apportionment should not obscure or minimize the Constitution's limitation on the states' ability to tax out-of-state income; although having discretion, no state has *carte blanche* in devising or applying its apportionment scheme. An apportionment formula may be "imperfect," but it must nevertheless be an "acceptable method of measuring the in-state earnings of an integrated business." *Mobil*, 445 U.S. at 452 (Stevens, J., dissenting). The shadow must be sliced, and it must be sliced fairly in accordance with constitutional principles.

One means of taxing in-state income is the use of the unitary business principle which calculates the local tax base by first defining the scope of the unitary business, of which the taxed enterprise's activities in the taxing state form one part, and then apportioning the total income of the unitary business between the taxing state and other jurisdictions based on a formula taking into account objective measures of the corporation's activities within and without the jurisdiction.[7] *Container Corp.*, 463 U.S. at 165. A balance must be struck between the state's unmistaken need for revenue

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[6] In evaluating challenges to state taxing schemes, the Court examines the practical effect of a challenged tax to determine whether it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

[7] Although the terms "allocation" and "apportionment" are often used interchangeably in respect of the division of income among various jurisdictions, "allocation" properly refers to the "attribution of a particular type of income to a designated state, whereas 'apportionment' refers to the division of the tax base by formula." JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *supra*, & 9.01 n.2.

and the taxpayer's legitimate right to protection from overreaching taxing authorities. It is for this Court to ensure that the balance is a reasonable one.[8] If the state has not "given anything for which it can ask return" in respect of the person, property, or transaction it seeks to tax, *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940), the Commerce and Due Process Clauses will operate as a constitutional brake upon the state's raw power to tax.

To pass constitutional muster under the Commerce and Due Process Clauses, the apportionment formula must, first and foremost, be fair. *Container Corp.*, 463 U.S. at 169. There must be internal consistency: "[T]he formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed." *Id.* There must also be external consistency: "[T]he factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated." *Id.*

Here, the issue is whether the apportionment formula used by Pennsylvania is properly designed to ensure against the proscribed taxation of extraterritorial income and value. In this case, Pennsylvania included all of Unisys Corporation's dividends from its subsidiaries, as well as their capitalized net worth, in its apportionable tax base. The state, however, refused to include in the three-factor apportionment formula the property, payroll, and sales of the subsidiaries that produced that income and value.[9] Thus, Pennsylvania's taxing scheme did not provide for "factor representation" in

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[8] *See Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977) (the Court has a duty "to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers").

[9] The three-factor formula used in this case is set forth in the corporate net income tax provisions and incorporated by reference into the franchise tax provisions. 72 P.S. §§ 7401(3)2.(a)(9)(B), 7602(b), 7603.

respect of the net worth of, and dividends received from, Unisys Corporation's subsidiaries. Consequently, Pennsylvania's take of the tax base is larger than it otherwise should have been, resulting in a distorted tax liability that increased by 90 percent for the tax year ending March 31, 1985, 23 percent for the tax year ending March 31, 1986, and 21 percent for the tax year ending December 31, 1986. During the ten-year period 1984-1994, the average distortion of Unisys's tax liability was 45 percent, and in one year, it exceeded 100 percent. App. 126a, 133a.

Amicus TEI submits that an apportionment formula that fails by design to take into account the factors generating the apportioned income and value is constitutionally flawed because there can never be a "rational relationship between the income attributed to the State and the intrastate values of the enterprise." *Mobil*, 445 U.S. at 436-37. The failure to provide factor representation is "inherently arbitrary," *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 121 (1920), and cannot help but produce a result that reflects neither "a reasonable sense of how [the] income [was] generated" (as required by *Container Corp.*, 463 U.S. at 169) nor "the relative contribution of the activities in the various States to the production of total unitary income" (*Butler Bros. v. McColgan*, 315 U.S. 501, 509 (1942)). This Court's prior holdings teach this conclusion and common sense confirms it.

In *Mobil*, the Court acknowledged that the factor representation issue could be one of constitutional import, but declined to resolve it on the ground that the issue had not been properly raised by the taxpayer. 445 U.S. at 434. The Court reserved the question, stating, "we need not, and do not, decide whether combined apportionment of this type [inclusion of the Mobil subsidiaries' and affiliates' sales, payroll, and property in the apportionment formula] is constitutionally required." *Id.* at 441 n.15. *See also id.* at 449 ("[b]ecause the issue has not been presented, we need not,

and do not, decide what the constituent elements of a fair apportionment formula applicable to such income would be"). The reservation of this issue in *Mobil* was specifically acknowledged by the Court in *Container Corp.*, 463 U.S. at 168 n.5. Justice Stevens, however, found the issue dispositive and would have proscribed "lump[ing] huge quantities of investment income that have no special connection with the taxpayer's operations in the taxing State into the tax base" without taking into account the factors that produced that income:

> Unless the sales, payroll, and property values connected with the production of income by the payor corporations are added to the denominator of the apportionment formula, the inclusion of earnings attributable to those corporations in the apportionable tax base will *inevitably* cause Mobil's Vermont income to be overstated.

445 U.S. at 461 (Stevens, J., dissenting) (emphasis added). *See also* JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION I: CORPORATE INCOME AND FRANCHISE TAXES ¶ 9.15[2] (3d ed. 1998) ("If the theoretical predicate for apportioning income from intangibles is that the payor of the intangible income is a subsidiary corporation engaged in a unitary business with the parent-payee, it follows as a matter of principle that the subsidiary-payor's factors should be included in the formula employed to apportion such income.").

Because apportionment methodologies employed in state taxing schemes are admittedly only "'rough approximation[s]' of . . . corporate income that [are] 'reasonably related to the activities conducted within the taxing state,'" *Exxon Corp. v. Dep't of Revenue*, 447 U.S. 207, 223 (1980), *quoting Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273-74 (1978), distortion can occur and must be protected against. Indeed, the "gross distortion" test arose from the Court's recognition that the taxing methodology employed by a state could operate "unreasonably and arbitrarily, in attributing to [a

State] a percentage of income out of all appropriate proportion to the business transacted in that state." *Hans Rees' Sons, Inc. v. North Carolina* ex rel. *Maxwell,* 283 U.S. 123, 135 (1931). The apportionment method invalidated in *Hans Rees* used a single factor based entirely on ownership of tangible personal property and resulted in a distortion of 250 percent. Almost 30 years later, in *Norfolk & W. Rwy. v. State Tax Comm'n*, 390 U.S. 317 (1968), the Court struck down an apportionment method with respect to a Missouri tax on the value of railroad rolling stock, based on the number of miles of track located within the state, where the taxpayer was able to demonstrate a 166-percent distortion. Concededly, the Court has upheld state taxation schemes that have produced distortive results. In *Moorman Mfg.*, Iowa's single-factor formula based on sales was upheld, even though the taxpayer showed a 48-percent difference between in the application of Iowa's single-factor formula and the standard three-factor formula. And the Court minimized the 14-percent distortion in *Container Corp.* as a "far cry" from the distortion extant in *Hans Rees* and insufficient to demonstrate that extraterritorial value was being reached by the state unconstitutionally. 463 U.S. at 183.

Amicus TEI submits, however, that the constitutionality of the state taxing scheme does not depend solely on whether a certain mathematical threshold is reached or exceeded.[10]

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[10] The distortion that Unisys can demonstrate here—an average of 45 percent during a ten-year period compared with the result had the formula reflected subsidiaries' factors—is slightly less than the Court upheld a quarter century ago in *Moorman Mfg.* But the distortion in one year did, and could easily again, exceed 100 percent. Moreover, *Hans Rees*, *Norfolk & W. Rwy.* and *Moorman Mfg.* all dealt with circumstances where the elements of both the tax base and the apportionment formula involved a single company. In *Container Corp.*, a case involving a multinational group of companies, a mismatch between a worldwide-consolidated tax base and a separate-entity apportionment was

More fundamentally, in this case the state did not even undertake to effect a fair result. Rather, the Commonwealth Court of Pennsylvania blithely concluded that the distortion—whatever its magnitude—was insufficient for constitutional relief, though it did direct the application of statutory equitable relief. App. 143a-146a. Similarly, the Supreme Court of Pennsylvania did not justify the apportionment formula on constitutional grounds but simply demurred the distortion was not sufficient to warrant intervention or prevention. Rather than effecting a straightforward, rational alignment of the tax base and the factors generating the tax base, the court concluded corrective action must await a more aggrieved taxpayer.[11]

But why wait? Where a state has made *no* effort to account for all the factors producing income or value in its apportionment scheme, whether the distortion is "gross" should not be a threshold question. To hold otherwise is to encourage the states to play a numbers game and insist that—even if inherent, structural distortion can be demonstrated—it is not enough. For Pennsylvania to wave its hand at obvious distortion in this case and eschew an opportunity to remedy it suggests that it is driven less by adherence to constitutional principles than by a desire to maximize revenues. TEI urges this Court to hold that any scheme with fundamental divergence between the source of the elements in the tax base and the source of the factors in the apportionment formula is unconstitutional.[12] In other words, the constitutional mandate

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not at issue. In sum, these cases addressed the issue of distortion from the apportionment method itself, not the issue of "factor representation."

[11] The court did concede that "Pennsylvania's scheme for taxation of foreign business franchises may be less than ideal and, absent statutory fairness adjustment, unconstitutional in some applications." App. 29a.

[12] To be sure, states need not attain perfection in their apportionment formula, but a threshold based on gross distortion is too high; requiring *gross* distortion in the face of an apportionment methodology that fails in

that the apportionment formula bear a rational relationship, "both on its face and in its application," to values connected with the taxing state, *Norfolk & Western Rwy.*, 390 U.S. at 325, requires more than lip service to the distortion doctrine.

A more demanding approach to distortive state tax schemes is justified because Pennsylvania is not alone in refusing to square its tax scheme with the mandates of the Due Process and Commerce Clauses. Taxing authorities in several other states have reached the same odious conclusion as the Supreme Court of Pennsylvania: Asymmetry between the tax base and the factors used to apportion it is deemed acceptable. *See, e.g., Ashland Pipe Line Co. v. Marx*, 623 So.2d 995, 1004 (Miss. 1993); *NCR Corp. v. South Carolina Tax Comm'n*, 439 S.E.2d 254, 257 (S.C. 1993), *cert. denied*, 512 U.S. 1245 (1994); *NCR Corp. v. Taxation and Revenue Dep't*, 856 P.2d 982, 991 (N.M. App.), *cert. denied*, 857 P.2d 788 (N.M. 1993), *cert. denied*, 512 U.S. 1245 (1994); *NCR Corp. v. Comm'r of Revenue*, 438 N.W.2d 86, 90 (Minn.), *cert. denied*, 493 U.S. 848 (1989); *NCR Corp. v. Comptroller of Treasury*, 544 A.2d 764, 779-81 (Md. 1988).

Fortunately, some states have come to a more principled conclusion. For example, the Maine Supreme Court has forthrightly held that the lack of factor representation is constitutionally fatal:

> [Without factor representation,] [t]he ineluctable result is that more of the business activity of the unitary business is attributed to [the State] than is the actual case. Thus, the income taxable by [the State] under the Assessor's formula does not truly reflect [the corporation's] connection with [the State] and fails to meet the test of fairness required by the due process clause.

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any way to account for the production of income or value undermines the protections against extraterritorial taxation that gave rise to the distortion principle.

Tambrands, Inc. v. State Tax Assessor, 595 A.2d 1039, 1044 (Me. 1991). Five years later, in *E.I. Du Pont de Nemours & Co.* v. *State Tax Assessor*, 675 A.2d 82, 89 (Me. 1996), the Maine court reaffirmed the importance of the factor representation, even while upholding the state's reconstituted statutory apportionment formula:

> We therefore abandon the internal consistency analysis set forth in *Tambrands*. At the same time, we reaffirm the ultimate conclusion in *Tambrands* that the Assessor's *failure to adjust a taxpayer's apportionment factors to reflect the taxpayer's activities both within and without the state of Maine may result in the taxation of extra-territorial value and, therefore, may run afoul of the fairness principles of the Due Process Clause.* Thus, we review the Assessor's Augusta Formula to determine whether it ensures that Du Pont's tax liability "fairly represents" its business activity in the state of Maine consistent with constitutional due process.

E.I. Du Pont de Nemours & Co., 675 A.2d at 89 (emphasis added). Other states, too, have confirmed that the failure to provide factor representation in applying the apportionment rules to unitary businesses contravenes the Due Process and Commerce Clauses. *See, e.g., American Tel. & Tel. Co. v. Wisconsin Dep't of Revenue*, 422 N.W.2d 629, 636 (Wis. Ct. App. 1988), *review denied*, 428 N.W.2d 554 (Wis. 1988) (involving dividends from unitary subsidiaries); *Homart Dev. Co. v. Norberg*, 529 A.2d 115, 121 (R.I. 1987) (involving distributive share from partnership).

The factor representation issue has been a neglected, rough area in state taxation for more than two decades,[13] with even

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[13] Since the Court's decision in *Mobil*, where the issue was reserved, writs of certiorari have been denied in several cases that have raised the factor representation issue. *E.g., Caterpillar Inc. v. New Hampshire Dep't of Revenue*, 741 A.2d 56 (N.H. 1999), *cert. denied*, 529 U.S. 1021 (2000); *Caterpillar Inc. v. Comm'r of Revenue*, 568 N.W.2d 695 (Minn. 1997), *cert. denied*, 522 U.S. 1112 (1998); *NCR Corp. v. South Carolina Tax*

the courts below commenting on the lack of clear guidance. Now is the time to make "the rough places smooth."[14] Now is the time for this Court to settle the issue of factor representation. Without a doubt, Pennsylvania's apportionment formula violates *Container Corp.*'s requirement of fairness: It is externally inconsistent in that it does not represent a reasonable sense of how the income was generated. *See Container Corp.*, 463 U.S. at 169-70; *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The Court should grant a writ of certiorari to affirm that where a state seeks to apportion a multistate tax base that includes value attributable to multiple corporations in a unitary or consolidated group, the state's apportionment formula must include appropriate amounts of payroll, property, and sales from all such corporations.[15] Only by requiring factor representation can the Court vivify the constitutional requirement of a fair apportionment formula. *Container Corp.*, 463 U.S. at 169.

Comm'n, 439 S.E.2d 254 (S.C. 1993), *cert. denied*, 512 U.S. 1245 (1994); *NCR Corp. v. Taxation and Revenue Dep't*, 856 P.2d 982 (N.M. App.), *cert. denied*, 857 P.2d 788 (N.M. 1993), *cert. denied*, 512 U.S. 1245 (1994); *NCR Corp. v. Comm'r of Revenue*, 438 N.W.2d 86 (Minn.), *cert. denied*, 493 U.S. 848 (1989).

[14] *Isaiah* 40:4b.

[15] *Amicus* TEI does not contend that states are constitutionally required to include any of the income or net worth of a taxpayer's subsidiaries in its tax base. Rather, if states do include this income or net worth, the factors from which it was generated should be reflected in the apportionment formula. Moreover, a state that seeks to include such income or net worth must operate within the confines of *Kraft General Foods, Inc. v. Iowa Dep't of Revenue and Fin.*, 505 U.S. 71, 80-82 (1992), finding a state's preference for domestic commerce over foreign commerce inconsistent with the Commerce Clause and violative of the Foreign Commerce Clause.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for a Writ of Certiorari and reverse the decision below.

Respectfully submitted,

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